(1)

No. _____

In the Supreme Court of the United States

JAMAL HAFEEZ-BEY,

Petitioner,

v

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of Appeals Ninth District of Texas at Beaumont

PETITION FOR WRIT OF CERTIORARI

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March 28, 2011

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QUESTION PRESENTED

Consistent with the mandates of the Fourteenth Amendment, may a State discharge its duty to provide due process of law by delegating to a third party its responsibility to give notice of hearing?

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Jamal Hafeez-Bey respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals which refused his petition for discretionary review, effectively affirming the decision of the Court of Appeals for the Ninth District of Texas at Beaumont upholding the 411th District Court finding that the Appellant intentionally or knowingly failed to appear after being released on bond

OPINIONS BELOW

Petitioner seeks review from the Texas Court of Criminal Appeals' refusal to accept his Petition for Discretionary Review, *Hafeez-Bey v. Texas*, PD-1436-10 (January 12, 2011)(unpublished), essentially affirming the opinion of the Court of Appeals – Ninth District of Texas at Beaumont reported at *Hafeez-Bey v. Texas*, Dist. No. 09-10-00013-CR (2010)(unpublished)

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment refusing Appellant's Petition for Discretionary Review on January 12, 2011 This petition is timely filed and the jurisdiction of this Court is invoked under Title 28 U.S.C. §§1254 and 1257(a), et seq.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteen Amendment to the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USCS Const. Amend. 14, §1 (Emphasis added).

INTRODUCTION

This case raises the fundamental question as to whether a State may discharge its constitutional obligation to provide notice of hearing by relying upon a third party. The Texas Court has responded in the affirmative That court declared due process was satisfied when a bondsman mailed a letter to Mr. Hafeez-Bey advising him of the scheduled arraignment despite the absence of any records to document the issuance of any notice by the court.

STATEMENT OF THE CASE

On February 13, 2000, Jamal Hafeez-Bey and his brother, Waahid Hafeez-Bey, were arrested in Polk County, Texas on a charge of possession of marijuana. Petitioner was subsequently released on bond He was later indicted and the case was scheduled for arraignment. Petitioner failed to appear and his bond was forfeited

Mr Hafeez-Bey was later indicted for bail jumping and failure to appear in violation of Texas Penal Code §§38.10 (a) and (f), respectively At issue was whether

the State of Texas proved that Petitioner intentionally or knowingly failed to appear for arraignment on the charge for which he had been released on bail when the State produced no evidence that it gave notice of the hearing to the Petitioner

At trial no physical evidence was presented of the actual notice of hearing. The district clerk testified that her office neither maintained a copy of the docket following docket call, nor retained a copy of the court's coordinator correspondence regarding court dates. No evidence was presented that the clerk sent notice to the Petitioner or to anyone on his behalf. The District Attorney also conceded that the official court file did not have a copy of any such notice.

The bondsman testified that her file was damaged and discarded after a hurricane therefore she had no record of any notice purportedly issued to the Petitioner However, she testified that she instructed her staff to mail a letter to Mr. Hafeez-Bey advising him of his court date, and that letter was not returned Mr. Hafeez-Bey's father testified that notice was never received at their address.

Nonetheless, based upon the foregoing evidence, the court concluded, *inter alia*, that there was adequate evidence that the Petitioner intentionally or knowingly engaged in a course of conduct designed to prevent him from receiving notice of the court appearance, or that he intentionally or knowingly failed to appear following release on bond The court also relied upon the terms of the bond itself that provided Mr. Hafeez-Bey would appear in the town of Livingston *instanter* and "remain from day to day . . .

until discharged". The trial court then entered a judgment of guilt and imposed a four year sentence.

On April 18, 2010 the Court of Appeals for the Ninth District of Texas at Beaumont affirmed the judgment of the trial court.[1] Appellant filed his petition for discretionary review which was denied on January 12, 2011 by the Texas Court of Criminal Appeals.[2]

REASONS FOR GRANTING PETITION

Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law " *In re Gault*, 387 U.S. 1, 13 (1967) Review of the decision by the Texas Court of Criminal Appeals is warranted because it effectively permits the State to discharge its constitutional obligation to comply with the Due Process Clause by delegating its duty to a third party Also this decision establishes a precarious precedent that essentially removes any burden on behalf of the State to provide proof that the court issued actual notice to an accused.

The Texas Courts essentially ignored Mr. Hafeez-Bey's complaint that he was denied due process of law. That court never fully addressed the lack of any proof that the clerk issued notice of the arraignment to the Petitioner The district clerk testified that "her office

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[1] *Hafeez-Bey v Texas*, Dist. No 09-10-00013-CR (2010) (Appendix A)

[2] *Hafeez-Bey v. Texas*, PD-1436-10 (Appendix B).

neither maintains a copy of the docket sheet following docket call nor retains a file copy of the court coordinator's correspondence regarding court dates". There was no finding that clerk ever mailed any notice to the Petitioner. In fact the State concedes there was no record of any notice being sent. The court relied upon the clerk's practice to send notice to the bonding company with anticipation that the Petitioner would ultimately be notified. However, this practice lacks any of the procedural safeguards mandated by the Fourth Amendment Moreover, any act by the bonding company in notifying the Petitioner is constitutionally irrelevant when determining whether due process has been given.

The Due Process Clause imposes a duty upon the State of Texas, not a bail bondsman, to provide notice. Due process at its barest minimum mandates the giving of notice and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). When the government can reasonably ascertain the name and address of an interested party, due process requires the government to send "notice by mail or other means as certain to ensure actual notice " *Mennonite Bd. of Missions v. Adams*, 462 U S. 791, 800 (1983) (Emphasis added) The Texas Code of Criminal Procedure acknowledges this obligation. It provides the district clerk shall serve summons ". . . upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address". Art 23 03(c) Texas Code of Criminal Procedure. (Emphasis added). Due Process forbids holding an accused accountable for failing to appear or answer an offense if the giving of

notice and the opportunity to be heard has been denied. The age old adage remains true: "notice and hearing are preliminary steps essential to the passing of an enforceable judgment. . " *Powell v. Ala.*, 287 U.S. 45, 68 (1932) This principle may not be denied nor compromised. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee *Loudermill*, 470 U.S. at 541. See also, *In re Oliver*, 333 U.S. 257, 273 (1948). Here, notice was never provided and the State of Texas may not rely upon a third party to discharge its constitutional obligations.

CONCLUSION

The Texas Court's decision raises ominous concerns if left unchecked Ultimately, it permits the State to delegate its constitutional responsibility to a third party to provide due process of law. For all these reasons, Mr. Hafeez-Bey prays that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00013-CR

[August 18, 2010]

JAMAL HAFEEZ-BEY, Appellant)
)
V.)
)
THE STATE OF TEXAS, Appellee)
)

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 16709

MEMORANDUM OPINION

Jamal Hafeez-Bey appeals his felony conviction and four-year sentence for bail jumping and failure to appear. *See* TEX. PEN CODE ANN § 38.10(a), (f) (Vernon 2003). The sole issue raised on appeal challenges the legal sufficiency of the evidence to support the conviction Hafeez-Bey contends the State failed to prove that he intentionally or knowingly failed to appear for arraignment on the charge for

which he had been released on $50,000 bail on an instanter bond. We affirm the judgment of the trial court.

On February 13, 2000, Jamal Hafeez-Bey and his brother, Waahid Hafeez-Bey, were arrested in Polk County on a charge of possession of marijuana in an amount of over five pounds but less than fifty pounds Their father paid approximately one half of the premium on a $50,000 bond for each of his sons and he signed a promissory note for the remainder of the premium. The bondsman, Sheila Bonin, executed the bonds as surety, Jamal and Waahid each executed a bond as principal, and the men were released. Jamal's signature and fingerprint appear on his bond, which provides that Jamal would appear

> in the town of Livingston instanter and there remain from day to day and term to term of said Court, until discharged by due course of law, then and there to answer said accusation against [him], and shall appear before any court or magistrate before whom the cause may hereafter be pending at any time when, and place where, [his] presence may be required[ ]

Bonin testified that she instructs people for whom she makes bond to call in every Monday between the hours of 8:00 a.m. and 4:00 p m., and further instructs them to call in on Tuesday if they fail to make contact on Monday Neither Jamal nor Waahid ever called in. During the first month, Bonin communicated with Jamal's parents about payment on the promissory note and the brothers' failure to report, but thereafter Bonin's repeated telephone calls went unanswered. Bonin did speak with Jamal's grandmother, and the

grandmother agreed to pass on Bonin's message. Bonin never received any calls or correspondence from Jamal regarding a court setting.

The grand jury handed down its indictment on August 24, 2001, and arraignment was scheduled for September 4, 2001. Bonin testified that the district clerk's office notified her that Jamal and Waahid were due in court on September 4, 2001. Her standard operating procedure upon being notified of a court setting is to contact the principal by telephone She makes repeated calls until she contacts someone If those efforts fail, she sends a letter Bonin testified that she telephoned Jamal but did not speak with him Bonin testified that she personally prepared the letter that was mailed to Jamal. Bonin's recollection is that she never received her notice back for either brother. Neither brother appeared for arraignment, and the bond was forfeited. Waahid was arrested some time later, perhaps in June 2002.

Jamal's father, Lateef Hafeez-Bey, testified that Jamal resided with him at the same address in Columbus, Ohio, between February 13, 2000, and September 4, 2001 Lateef claimed that his wife made payments on the bond premium and that his wife would talk to Bonin on the telephone Lateef testified that he does not recall receiving any mail from the bail bonding company regarding a court setting for September 4, 2001. He did not receive a telephone call or a notice of a court setting. Lateef does not recall Jamal receiving notice of a court setting He learned that the case was still active when Waahid was arrested and transported from Ohio Lateef had no knowledge of whether Jamal attempted to contact the bonding company after Waahid's arrest.

In evaluating the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L Ed 2d 560 (1979). As a reviewing court, we must defer to the trier of fact on the resolution of conflicting testimony, the weight to be given evidence, and the reasonable inferences drawn from the testimony. *Id.* at 318-19

Hafeez-Bey contends the prosecution failed to prove that he intentionally or knowingly failed to appear in the 258th District Court of Polk County, Texas, on September 4, 2001. He relies on the lack of documentary evidence, but the witnesses explained the lack of documentation The district clerk testified that her office neither maintains a copy of the docket sheet following docket call nor retains a file copy of the court coordinator's correspondence regarding court dates Bonin testified that her file was damaged and discarded after a hurricane.

Hafeez-Bey contends the State failed to prove that he had actual notice of the arraignment setting. He relies on Lateef's testimony that no notice was received at their address. Bonin had the correct contact information, and she testified that a notice was mailed and not returned. The trial court could have found her testimony to be credible and could have drawn an inference that the letter did reach the addressee, but that appellant's father either was mistaken about whether Jamal had received the letter or was not being truthful about it

Hafeez-Bey contends the bond does not provide adequate notice of his obligation to appear before the 258th District Court on September 4, 2001. The pre-indictment bond notifies Hafeez-Bey that he stands charged with a felony in the District Court of Polk County, and by signing the bond Hafeez-Bey promises to appear instanter "before said Court." Generally, an instanter bond gives proper notice and, in the absence of evidence of a reasonable excuse, is sufficient to prove an appellant intentionally and knowingly failed to appear in accordance with the terms of his release *Euziere v. State*, 648 S.W.2d 700, 702 (Tex. Crim. App 1983). The cases cited by the appellant are distinguishable because in those cases the State produced no evidence of either actual notice of the hearing or conduct by the defendant that was designed to prevent the defendant from receiving actual notice. *See Fish v. State*, 734 S.W 2d 741 (Tex. App.--Dallas 1987, pet. ref'd); *Richardson v State*, 699 S.W.2d 235 (Tex. App.--Austin 1985, pet ref'd)

Fish v State was a prosecution for driving while intoxicated. *Fish*, 734 S W.2d at 741. The defendant made a pre-indictment instanter bond on which the court in which he would appear was left blank. *Id* at 741-42. The defendant was later indicted for felony DWI and failed to appear for arraignment. *Id.* at 742. The record contained no evidence that the defendant either had actual notice of the hearing or that he engaged in a course of conduct designed to prevent him from receiving notice *Id* at 743 The appellate court held no rational trier of fact could find beyond a reasonable doubt that the defendant intentionally and knowingly failed to appear. *Id.* at 743-44.

This case bears more similarity to *Bell v. State*, a case in which the instanter bond left the name of the court blank, but the record contained other evidence that the defendant was aware that he had to appear in court. *Bell v. State*, 63 S.W.3d 529, 532 (Tex App --Texarkana 2001, pet. ref'd). After the defendant failed to appear, he did not return to the county voluntarily, but had to be arrested *Id.* at 533 The reviewing court found that a rational jury could have found that the defendant intentionally or knowingly failed to appear *Id.*

In *Richardson v. State*, the court coordinator testified that she did not notify the defendant directly but sent the notice to the surety. *Richardson*, 699 S.W.2d at 237. The surety testified that he told the defendant that the surety would notify him of any court dates, that the surety did not receive the court coordinator's notice, and that the surety did not notify the defendant of the court date *Id.* Because it was undisputed that the defendant did not have notice of the hearing after having been assured he would be notified of any court dates by the bondsman, and there was no evidence that the defendant engaged in conduct designed to prevent him from receiving notice, the appellate court held no rational trier of fact could find beyond a reasonable doubt that the defendant intentionally and knowingly failed to appear. *Id* at 237-38.

This case more closely resembles *Solomon v. State*, a case in which the court held the evidence was legally sufficient to establish an intentional or knowing failure to appear. *Solomon v. State*, 999 S.W.2d 35, 38 (Tex. App.--Houston [14th Dist.] 1999, no pet.). The defendant's former lawyer testified that the notice of

the setting came back in the mail, but the lawyer did speak with a family member, and the court coordinator testified that her letter to the defendant was not returned. *Id.* at 37-38. Like *Solomon*, the trier of fact in this case heard testimony that a written notice was mailed and not returned

The culpable mental state for bail jumping and failure to appear may be established through evidence that the defendant intentionally or knowingly engaged in a course of conduct designed to prevent his receiving notice. In one case, the defendant testified that he did not receive notice of the hearing because he was a transient. *Etchison v. State,* 880 S.W.2d 191, 192-93 (Tex. App.--Texarkana 1994, no pet) The defendant's bondsman testified that after he made bond he never saw the defendant again, and there was no evidence that the defendant ever tried to contact the court, the bondsman, or his attorney to determine the status of the case. *Id.* The reviewing court held the evidence was sufficient to establish that the defendant intentionally or knowingly engaged in a course of conduct designed to prevent his receiving notice. *Id.* at 193.

In another case, a defendant released on an instanter bond could not be found at the address on the bond. *Vanderhorst v. State,* 821 S.W.2d 180, 181-82 (Tex. App.--Eastland 1991, pet. ref'd). On appeal he argued that his lack of notice constituted a reasonable excuse for his failure to appear *Id.* at 182. The reviewing court held that the defendant's failure to provide his forwarding address provided sufficient evidence for the jury to find that he intentionally or knowingly engaged in a course of conduct which would prevent him from receiving notice *Id.*

In *Walker v. State*, the surety testified that after she obtained the defendant's release on an instanter bond, the defendant never again contacted her. *Walker v. State*, 291 S.W.3d 114, 119 (Tex. App.--Texarkana 2009, no pet.). The surety mailed an arraignment notice and confirmed its receipt with a family member *Id.* The reviewing court held the trier of fact could reject the defendant's testimony that he did not receive the notice and affirmed the judgment. *Id.* at 120.

Similarly, in *Burns v. State*, the bondsman on the defendant's instanter bond testified that the defendant ignored the bondsman's instructions to call him every Monday. *Burns v. State*, 958 S.W.2d 483, 488 (Tex. App.--Houston [14th Dist. 1997, no pet.). A notice of the court date was mailed to the defendant and was not returned *Id* The surety could not contact the defendant by calling the telephone number the defendant provided. *Id.* The reviewing court found legally sufficient evidence of the defendant's intentional or knowing failure to appear *Id*

Viewed in the light most favorable to the prosecution, the surety instructed Hafeez-Bey to contact her every week, yet Hafeez-Bey never contacted the surety. After the first month, the surety's telephone calls were not answered at the appellant's residence. A notice mailed to appellant's address was not returned undelivered The appellant's behavior was not consistent with an intent to appear, and the trial court could rationally disregard his father's testimony regarding receipt of written notice. Hafeez-Bey's state of mind can also be inferred from his conduct after his failure to appear, as he never contacted anyone about the charges even after his brother had been apprehended on the same charge.

The trial court conducting the bench trial could rationally find that Hafeez-Bey intentionally or knowingly engaged in a course of conduct designed to prevent him from receiving notice of the court appearance required by the instanter bond, and could rationally find that Hafeez-Bey intentionally or knowingly failed to appear after having been released on bond. We overrule the issue and affirm the judgment of the trial court.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on July 13, 2010
Opinion Delivered August 18, 2010
Do Not Publish

Before McKeithen, C J., Gaultney and Kreger, JJ.

APPENDIX B

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Wednesday, January 12, 2011
Re: Case No PD-1436-10
COA#: 09-10-00013-CR
STYLE: HAFEEZ-BEY, JAMAL

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

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